Transportation Communications International Union

An affiliate of the International Association of Machinists and Aerospace Workers

God Bless America

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Mary L. Johnson, General Counsel
National Mediation Board
1301 K Street, NW, Suite 250 East
Washington, DC 20005-7011

Re: Comments of Transportation•Communications International Union (TCU) on Proposed Changes to NMB Representation Manual, 35 NMB Nos. 61 and 62

Dear Ms. Johnson:

Please accept TCU's comments on the NMB's proposed modifications to the Board's Representation Manual in the above captioned matter. TCU also joins in the comments submitted by the Transportation Trades Department of the AFL-CIO and the International Association of Machinists, with which it is affiliated.

Proposed Rule 19.701 Mergers

The proposed change adds a new paragraph to this section providing that, in a merger where one of the affected carriers has a certified representative and the other does not, the Board will extend the certification of the representative on the certified carrier only where that representative has "more than a substantial majority." While the current rules do not address this situation, NMB decisions since 1989 have consistently held that certifications would be extended in mergers when the involved employee groups were not of "comparable" size. See, e.g., US Air/Piedmont, 16 NMB 412 (1989). This rule has been consistently applied to mergers where both employee groups were represented as well as to mergers

involving represented and unrepresented groups. See, e.g., Airtran Airways/Airtran Airlines, 26 NMB 82 (1998) (cases cited therein).

In their letter of August 12, 2008, to Senator Kennedy and Congressmen Oberstar and Miller, Chair Van De Water and Member Dougherty stated that the standard established by prior Board precedent and practices has "not changed." (Van de Water/Dougherty letter at p. 3) The proposed addition to the NMB rules was intended to merely provide "helpful clarifications" of existing Board policy. (Van de Water/Dougherty letter at p. 4)

But the term "more than a substantial majority" suggests a different and higher standard than "comparable," even though the Board apparently intends no such change. Unlike the new "substantial majority" test, the "comparable" test has two decades of decisions and practices that give it meaning. The new policy articulation of "more than a substantial majority" does not automatically carry with it those same practices and policies. At best, the proposal adds confusion and certainly offers no clarification of policy. Confusion is almost certain to arise since the plain meaning of "more than a substantial majority" is not necessarily the same as not having "comparable" complements. Certainly the proposal will raise questions, which the Board will have to answer in future cases, as to whether the proposed new articulation of the Board's policy represents a change in that policy in spite of Chair Van de Water and Member Dougherty's recent statement that the policy has not changed. (Van de Water/Dougherty letter)

Further, even if the proposal clarified current policy, which as noted above it clearly does not, there is no urgency or even a reason to issue such a clarification after two decades of consistent decisions and practices. It is inappropriate to attempt to modify the articulation of such a well established policy at a time when the largest merger in commercial airline history is pending. Even accepting Chair Van De Water and Member Dougherty's explanation that the proposal was in no way related to the Delta/Northwest merger, the timing of this proposal inevitably gives rise to the troubling "perception that the NMB is biased in favor of favor of carriers in general and Delta Airlines in particular." Letter of August 15, 2008, from Member Hoglander to Senator Kennedy. This appearance damages the Board and will seriously undermine its mission.

The Board's efforts to clarify its statement that authorization cards "may not be used toward getting a certification extended" by adding an additional statement that this language does not preclude certification by card check under Section 7.0 only

adds to the confusion. The Board should extend a labor organization's certification when its membership among one employee group and additional authorization cards from the unrepresented group constitutes a majority. Any suggestion that it would not do so when the carrier is agreeable to such an extension is contrary to Section 2, Fourth of the Railway Labor Act, which states that a majority of the craft and class shall determine who shall be its representative.

The adoption of this proposal does not clarify but can only lead to confusion. Its adoption serves no purpose and will inevitably undermine the Board's credibility. The proposal should not be adopted, and the Board should rely on its policy and practices that have been well established over the last two decades.

Proposed Rule 13.304.2 Valid Votes

The Board proposes to add a new section indicating that votes for "a current political candidate or other widely known individual, where it is clear that the voter does not intend for that individual to represent the craft and class..." shall be invalid. Rule 13.304.1 states clearly that, regardless for whom a vote may be cast, it will count so long as it is clear that the voter intends to vote for representation. The statute makes clear that a representative may be an "individual or an organization," 45 U.S.C. § 152, Ninth, and that a representative is not restricted to employees of the carrier. 45 U.S.C. § 152, Third.

An employee may indicate his desire for no representation simply by not returning his ballot. However, the Board has held that it "will not accept post-election claims that employees who made proper use of the write-in space did not intend to vote. Zantop International Airlines, 9 NMB 70, 78 (1981). The Board will not discount a ballot even when the vote is for a defunct or non-existing union, and the Board does not speculate as to the voter's understanding of the possible composition of such an entity. Business Express, Inc., 22 NMB 42, 46 (1994).

The Board's proposal would result in the following anomaly: a vote for a non-existing entity counts, but a vote for an existing public figure does not. The Board will not speculate regarding the voter's intent when voting for a non-existing entity; it will speculate regarding the voter's intent when the vote is cast for an existing public figure. A vote for an existing public figure does not indicate that the employee wants representation, while a vote for a non-existing entity indicates the employee wants representation.

The current practice is clear - where an employee votes by write-in the name of a representative, that vote should count. The Board should not attempt to divine whether the employee really intended to vote for representation by the public notoriety of the name written in. The instructions consistent with the Railway Labor Act itself make clear that the employee may write in the name of any "individual or organization" and that casting a vote is a vote for representation. Deviating from this clear standard will only lead to confusion and is contrary to the Board's well developed practices, precedent, and the statute itself.

Proposed Rule 3.3 Acceptance of Additional Authorizations, Deadline for Intervention

This proposal permits the carrier to control the timing of when applicants or intervenors may submit additional authorization cards according to when it submits the list of eligible voters. Applicants and intervenors should have until the date by which carrier is required to provide the list for the submission of additional authorizations, regardless of when carrier actually submits the list.

Public Hearing

A number of parties requested that the Board hold a public hearing on this matter. Given the scope of the changes being proposed, we join in that request. There is no down side for the Board to delay action on the proposed rule changes until it is able to be informed by a fully developed record through a public hearing.

TCU thanks the Board for the opportunity to comment on these proposed rule changes and its consideration of these comments.

Respectfully submitted,

Mitchell Kraus

Mitchell M. Kraus
General Counsel

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